IN THE MATTER OF A COMPLAINT FILED ON OCTOBER 16, 1989 BY ANN M. ELKAS AGAINST THE BLUSH STOP, INC., ALAM KHWAJA, DIANE ROBERTSON, 601789 ONTARIO LIMITED AND 815673 ONTARIO LIMITED, ALLEGING DISCRIMINATION BECAUSE OF HANDICAP UNDER SECTION 4 [now 5] (1) and 8 [now 9] OF THE *ONTARIO HUMAN RIGHTS CODE*, R.S.O. 1990, c.H. 19.

DECISION ON COSTS

As part of the dismissal of the above complaint the Board of Inquiry invited the parties to submit written arguments whether or not costs should be awarded in accordance with s. 41(4) of the *Ontario Human Rights Code* ("the *Code*"). Subsequent to their receipt, the following decision is rendered.

Jurisdiction.

The law is clear that a board of inquiry has jurisdiction to award costs: S. 41(4) states:

> Where, upon dismissing a complaint, the board of inquiry finds that,
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> (a) the complaint was trivial, frivolous, vexatious or made in bad faith; or
>
> (b) in the particular circumstances undue hardship was caused to the person complained against,
>
> the board of inquiry may order the Commission to pay to the person complained against such costs as are fixed by the board.

The phrase "may order" in the concluding paragraph clearly makes this particular power of the board discretionary.

Application.

This Board finds that subsection 41(4)(a) is not applicable to the complaint, since in the common understanding of these terms and their

explication by precedents neither the actions of the Complainant, Ms. Elkas, nor of the Ontario Human Rights Commission (the "Commission") were tainted in this fashion.

However, the applicability of subsection (b) requires a more detailed analysis, and especially the issue of undue hardship. Prior to its consideration it is important to understand the respective roles of the investigating officer and the Commission

1. The part of the investigating officer.

Respondent counsel argues that Ms. Zack-Caraballo started her investigation before a complaint form had been signed and thereby exceeded her authority; and furthermore, that she influenced the course of events by contacting Mr. Khwaja, the president of the respondent company, Blush Stop Ltd.

This Board does not find the officer's attempt to resolve the matter informally to be in violation of the *Code* or its purposes. Whether or not she did in fact contact Mr. Khwaja was in dispute during the hearings and its resolution did not determine the decision.

The upshot of her investigation was to advise the Commission (in her first Case Summary) not to deal with the case altogether, as provided under s. 33 [now 34] of the *Code*. The Board finds the officer to have been fair-minded and professional.

2. The role of the Commission.

This Board was not privy to the discussion of the Commissioners which led to their decision to investigate the matter further, and to request the Minister to appoint a board of inquiry, notwithstanding the officer's first Case Summary.

The Commission came to the conclusion that the Complainant's illness constituted a handicap in the meaning of the law, and that the facts surrounding her dismissal were such as to support her complaint under ss. 4 [now 5] (1) and 8 [now 9] of the *Code*. This interpretation of the law constituted a *conditio sine qua non* for the Commission to proceed with the matter.

When Prof. Daniel Baum issued his decision in *Ouimette v. Lily Cups Ltd. et al.* (1990) 12 C.H.R.R. D/19 (Ont. Bd. of Inquiry), he laid down a series of

criteria. They clearly excluded the illness from which Ms. Elkas suffered. Her illness was temporary, and thus not covered by the "handicap" provision of the *Code.*

In her argument on costs, Commission counsel adds the following by way of historical perspective:

> 33. In 1990, following the release of the *Ouimette* decision, officers across the Commission were asked to review their cases to see whether there were any that appeared to be caught by the board's ruling. During that period numerous cases were forwarded to the Commission for a determination of whether the complainants' medical conditions were "handicaps" as defined by the *Code.* Ultimately the Commission decided "not to deal" with a number of these complaints under s. 33 [now 34] (1)(c). However, many of these cases were in the (very wide) "grey" area, and a determination was not easily made.
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> 34. Whether or not something is a "handicap" is clearly a policy/legal issue, and one in which a human rights officer has no particular expertise. Ultimately this is a decision to be made by either the Human Rights Commission or, in the event that the Commission decides to proceed with the complaint, a board of inquiry.

In fact, Commission counsel suggested during the hearings that this Board need not feel itself bound by this decision. Obviously, the instant case was judged by the Commission to be a test case, and although its counsel averred that this was not the case it must be so characterized.

To say this does not mean to censure the Commission, for it has every right to conclude that a certain matter--in this case, whether deep vein phlebitis fits the definition of handicap-- warrants the consideration of a board of inquiry. Thus, there have been two conflicting decisions of boards of inquiry regarding the question whether Crohn's disease is a handicap. (*Surge v. Excelsior Glass,* unreported, November 12, 1993; *Narzano v. Nathar Ltd.* (1992), 18 C.H.R.R. D/248.) Instituting a test case is therefore an important privilege of the Commission.

However, it is the opinion of this Board that such a privilege should be used with proper caution, for more than legal considerations are at stake. The Commission must also, as at all times, consider the issue of fairness.

Human rights legislation is by its very terminology a body of law which aims at the equal treatment of *all* members of the polity. To be sure, it aims to protect first and foremost the weakest elements of society, and the *Code* is clearly devoted to this purpose. Yet in its pursuit of justice the Commission must consider not only the complainant but also the respondent.

Every decision of the Commission to request a board of inquiry immediately saddles a respondent who wishes to be represented by counsel with a substantial monetary burden. In addition, the respondent may be exposed to social opprobrium by the mere appointment of a board (especially when charges of sexual harassment are involved); and a case which drags on for years before a decision is rendered may cause the respondent prolonged anxiety and tension, even if the board eventually finds that the law had not been broken.

Thus, a degree of inequity has been built into the system. In ordinary civil litigation, the party instituting a suit bears the financial risk of failure, while under the *Code* this is normally not the case, except for the narrow provisions of s. 41 (4). And even then, the Commission itself does not suffer the same loss as would an ordinary citizen under similar circumstances. The Commission puts not itself but the taxpayer at risk.

In effect, it itself is risk free. When it decides to request a board of inquiry it does so undoubtedly out of high motives, but its decision to proceed inflicts upon respondents a significant burden, even if their behaviour will in the end be judged to have been exemplary.

Commission counsel warns that if every time the Commission loses a case costs would be awarded to the respondent, it would be an effective means of discouraging the full airing of numerous cases. That may well be so, but the law narrows the cost award by giving boards of inquiry the discretion to order a cost award only when particular circumstances justify it.

Generally, the Commission is cautious when it comes to the question whether the *factual evidence* in the case warrants a board, and costs are

therefore rarely awarded, unless the whole procedure is found to be flawed.

Test cases are of a special nature. The Commission must keep in mind that when it tests the law it does so on the back of respondents. They pay for the exercise even if they win.

In the instant case, with Respondents having the complaint against them dismissed, we must proceed to ask whether the stipulations of s.41(4)(b) are applicable. Was undue hardship caused to the Respondents?

3. Undue hardship.

In *Jerome v. DeMarco*, unreported, May 21, 1993, an Ontario board of inquiry, having reference to s.41(4)(b) of the *Code*, defined the terms as follows:

> Undue: Not in accordance with what is just or right; unjustifiable ... not appropriate or suitable.
>
> Hardship: Quality of being hard to bear; painfully difficult ...

Did these conditions apply to the Respondents? It was not disputed that they were in serious financial difficulties.

Mr. Khwaja testified that he subsequently lost everything he owned, and Exhibit 43 shows that the Royal Bank of Canada was about to seize his personal assets while this Board's proceedings had already commenced.

Ms. Robertson, in turn, appears to have been reduced to a part-time, low paying job, and all she owns is her family home. Commission counsel suggested that perhaps this Respondent's financial condition was not as bad as she had indicated. I find this assertion unwarranted, in view of the fact that no attempt was made to question her in this respect.

The Board therefore concludes that the pursuit of the complaint by the Commission placed a heavy burden on the Respondents, which--being innocent of the charge against them--they cannot in all fairness be expected to bear. They suffered undue hardship.

A similar observation in law was made by Prof. Robert W. Kerr in Shreve v. City of Windsor, May 25, 1993 (unreported; Ont. Bd. of Inquiry):

> With respect to the financial impact on the Respondent Hancock, I have indicated that even the normal costs of defending against a

complaint may be an undue hardship upon an individual Respondent who has no way of distributing these costs. (p.9)

S. 41 is meant to open the doors of relief to deserving respondents, and therefore the provision should be understood broadly enough to make it a serviceable instrument of natural justice. This point of view was thoroughly examined in *John v. East York Board of Education (No. 2)* (1991) 17 C.H.R.R., D/175, at D/193 and 194.

4. Further considerations.

Respondent counsel has brought forth a number of other considerations which, he argues, are in themselves reasons to satisfy the requirements of s.41(4) Among these are matters of timely disclosure, the absence of medical testimony, dilatory procedures by the Commission (which made it impossible for the Respondents to call a key witness), as well as a settlement offer which Ms. Robertson is said to have made and which was rejected by the Complainant. None of these, so it appears to this Board, warrants the application of s. 41(4).

There remains one other issue which requires separate mention. At the beginning of the hearings the Commission moved to add "reprisal" to the complaint. The Board agreed (over the objections of Respondent counsel), because--not having knowledge of any particulars of the case beyond the complaint form--it followed the common practice of admitting this kind of enlargement of the complaint, with a view to deciding it at a later time.

As the case unfolded it became clear that adding the cause of reprisal (noted separately as s.8 of the *Code*) was not merely a legal addendum, but introduced a wholly new charge of malfeasance into the proceedings. After reviewing all aspects of the charge the Board found it to be without any merit (see the main body of the decision).

The matter has some bearing on the issue of costs. For this last-minute effort to give an additional dimension to the case emphasizes its basic weakness. The Commission would have done better if it had heeded the assessment of its officer not to deal any further with the matter. By refusing to do so, and by sending the case to a board of inquiry, it laid a material and emotional burden upon the Respondents. Undoubtedly it did so out of the highest motivation, but to pursue it has its price.

Order.

The Board, finding the provisions of s.41(4)(b) to be applicable, orders the Commission to pay the legal costs of Respondent counsel.

The Board will remain seized of the matter should the parties be unable to resolve the extent of the legal costs incurred.

No other costs are awarded.

Toronto, September 6, 1994

W. GUNTHER PLAUT, BOARD OF INQUIRY